

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)

Implementation of Sections of)
the Cable Television Consumer)
Protection and Competition Act)
of 1992)

Rate Regulation)
_____)

MM Docket 92-266

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

OPPOSITION TO PETITIONS FOR RECONSIDERATION OF

CENTER FOR MEDIA EDUCATION

SUMMARY

CME et al. oppose portions of several Petitions for Reconsideration of the Commission's recent Order regarding cable leased access channels. Specifically, CME urges the Commission to deny petitions contending that the use of the highest implicit access fee and three programming categories will not result in high enough rates. The maximum rates established by the Commission are too high for all programmers and particularly for non-profit programmers. Moreover, these rates are not necessary to prevent migration. Thus, to better implement Congress's intent to increase diversity and competition, the Commission should establish rate maximums that are affordable for all programmers. The Commission should also deny ValueVision's petition seeking lower rates for home shopping networks only. CME opposes favorable treatment for home shopping networks within the context of the implicit rate structure. A lower rate for home shopping would result in the displacement of other programming that contributes more to diversity and the public interest, thereby defeating the core purpose of leased access.

CME urges the Commission to deny petitions challenging the Commission's decision to require cable operators to provide billing and collection services for channel lessees. The statute requires cable operators to provide billing and collection services and the availability of such service is necessary to ensure the success of leased access.

Finally, the Commission should deny petitions requesting the

elimination of all part-time leasing. It is essential to the success of leased access that programmers be permitted to lease less than a full channel. A large portion of programmers seeking to use leased access channels will want to do so on a part-time basis only. The diversity that Congress sought when it enacted the leased access provision will be achieved only if such programmers are permitted access to cable systems on a part-time basis.

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OPPOSITION TO PETITIONS FOR RECONSIDERATION

Pursuant to Section 1.429 of the Rules, 47 C.F.R. § 1.429, the Center for Media Education, the Association of Independent Video and Filmmakers, the National Association of Artists' Organizations, and the National Alliance for Media Arts and Culture (hereinafter collectively referred to as "CME") respectfully oppose aspects of certain Petitions for Reconsideration filed in the above referenced proceeding concerning leased access.

I. The Commission Must Ensure that the Rates for All Lessees Are Affordable.

In its Order, the Commission adopted the highest implicit access fee as the maximum reasonable rate that a cable operator can charge for a leased access channel. Order, ¶ 515-17.

Several cable operators contend that the Commission's adoption of the highest implicit access fee as the maximum reasonable rate and its adoption of three programming categories will not result in high enough rates. CME believes that using the highest

Congress's intent to increase diversity and competition. Indeed, every programmer that filed a petition contends that rates will be too high under the scheme adopted by the Commission. See SUR Pet. at 7-8; Paradise Television Pet. at 6-7; CBA Pet. at 1-2. CME thus opposes all petitions seeking rates above the highest implicit access fee and an elimination or reduction in programming categories.

Time-Warner, for instance, claims that the Commission should eliminate the three programming categories on the ground that the Commission based its decision on the erroneous assumption that "leasing issues vary depending on the nature of programming provided." Time-Warner Pet. at 34. Rather, "[t]he value of each leased access channel is the opportunity cost imposed on the operator from the lost chance to program these channels." Id. Therefore, Time-Warner claims, the cable operator should be permitted to charge the highest implicit per subscriber rate across all of its non-leased access programming. Id.

Time-Warner clearly misunderstands the goals of the leased access provisions. The leased access provisions are intended to promote diversity and competition in the sources of video programming; they are not intended to maximize the cable operator's profits when it leases a channel.¹ CME concurs with SUR's recommendation that "opportunity 'loss' must be explicitly

¹ Indeed, Congress anticipated that cable operators would charge different rates depending on the nature of the programming. See H.R. Rep. No. 934, 98th Cong., 2d Sess. 51 (1984).

eliminated by the Commission as any ground for asserting adverse financial affect on the system. It simply is a 'loss' mandated as a function of the commercial leased access provision of Section 612." SUR Pet. at 16-17.

In addition, Time-Warner fails to support its contention with any evidence that such a rate is necessary to maintain the financial viability of the cable operator. While the law requires that the rate be sufficient "to assure that such use will not adversely affect the operating, financial condition or market development of the cable system," § 612(c)(1), the law does not guarantee that the cable operator will receive profits equivalent to those received for the programming on its regular channels. See also SUR Pet. at 7-8. In fact, leasing 10-15% of its capacity to programmers is a comparatively minor sideline to the cable operator's overall business. Without hard evidence that the cable operator will cease to operate, the Commission should not interpret the "no adverse affect" provision in favor of the cable operator, particularly at the expense of the public.

Comcast, on the other hand, argues that the "Commission should amend its rules to allow cable operators to show, as disputes arise, why a leased access charge above the calculated 'maximum rate' for the non-pay, non-home shopping category of programming is warranted." Comcast Pet. at 21. Comcast's proposal is a response to its concerns that the calculation of the highest implicit access fee for the non-pay and non-home shopping programming, which uses the "value to a subscriber" of a

single channel on a tier, is an "average channel value" and thus does not take into account the actual value to the subscriber of each particular channel. Id. at 19. Accordingly, Comcast contends that "[b]ecause the maximum leased access rates cable operators could charge under the formula would be lower than the highest implicit fees actually charged for nonaffiliated programming, the likelihood of migration to leased access by non-leased access programmers would be increased."² Id. at 20-21.

Comcast's analysis of migration is flawed. There is no danger that programmers in the "all other" rate category will migrate. This category contains basic networks such as CNN and ESPN which receive monthly per subscriber payments from cable operators. These networks are supported by the dual revenue stream of cable operator payments and advertising. Programmers will not forsake this arrangement in exchange for the privilege of paying leasing fees.³

Nor is there any risk that home shopping networks will migrate unless the leasing rates are set below the current explicit rates. See ValueVision Pet. at 3. Thus, as we discuss

² Comcast also claims that the rates that it currently...

Infra at 6, home shopping should be set above explicit rates, both to deter migration and to ensure that the limited number of leased access channels are not filled up with home shopping services. See CME Comments at 16.

Only with the pay programming does a significant threat of migration exist in theory, since those programmers pay comparatively high implicit rates. This view is supported by the cable industry's own submission: "programmers who are currently paying the highest implicit access fee" are the most likely to migrate. Stanley M. Besen et al., An Analysis of Cable Television Rate Regulation (Charles River Assoc., Inc., January 27, 1993) at 55. However, by creating a separate category for pay services the possibility of migration is eliminated.

The cable industry's prime argument against lower leased access channel rates is thus largely fallacious. To the degree, however, the Commission believes that migration is a serious possibility, it should bar migration. See CME Reply Comments at 5-6. By barring migration the Commission could set the maximum reasonable rate far below the highest implicit access fee without causing a hardship on the cable operator. See CME Comments at 33; CME Reply Comments at 5. Indeed, the Commission's sole reason for adopting the highest implicit access fee as the maximum reasonable rate was to alleviate the cable operators' fears that migration would occur. Thus, the rational underpinning of the Commission's adoption of the highest implicit access fee is gone. CME urges the Commission to reject those

Petitions that claim higher rates are needed to prevent migration, and instead, lower the rates to a level that programmers will be able to afford. In addition, CME reiterates its contention made in its earlier filings that even lower rates are needed for non-profits. See CME Comments at 21; CME Reply Comments at 12; CME Pet. at 11.

II. The Commission Should Not Adopt a Lower Rate for Home Shopping Networks While Maintaining Prohibitive Rates for the Other Programming Categories.

Several petitions indicate confusion about how the Commission intends to determine the implicit fee for home shopping. See e.g., Continental Pet. at 24; ValueVision Pet. at 3. CME agrees that the Commission's rules need clarification. Specifically, it urges the Commission to clarify that home shopping rates should not be more favorable than those for other types of programming.

ValueVision, a home shopping network, urges the Commission to permit home shopping programmers to lease channels at a rate equivalent to the explicit rate currently being paid by home shopping programmers on the regular cable system, typically 5% of sales revenues (net of returns), rather than highest implicit access fee plus the explicit fee. ValueVision Pet. at 3.

ValueVision's proposal would result in far lower per subscriber rates than those afforded to other categories of programming. First, home shopping networks would be required to pay on the basis of their earned revenue; other lessees, however, would be required to pay the highest implicit access fee

regardless of the revenue it earned. Second, CME understands from discussions with people in the industry that the monthly explicit fee paid by home shopping networks is estimated to be equivalent to \$.05-\$.12 per subscriber -- significantly below the \$.50 monthly subscriber rate anticipated by the Commission for the "all other" category.⁴

CME opposes ValueVision's proposal for favorable treatment to home shopping networks within the context of the implicit rate structure. To adopt a lower rate for home shopping networks while maintaining prohibitive rate standards for the other

networks is not a reasonable and feasible

services to lessees. Comcast erroneously claims that "there is nothing in the statute suggesting that the presumption should be in favor of an obligation" on the cable operator to provide billing and collection. Comcast Pet. at 22-23; see also Booth American Pet. at 48. The Cable Act, however, requires that the Commission adopt rules to "establish reasonable terms and conditions for [commercial leased] use, including those for billing and collection." § 612(c)(4)(A)(ii). The plain language of the statute thus requires the Commission to establish reasonable terms and conditions for billing and collection for all cable systems.⁵ See also CME Comments at 25-26. Such "terms and conditions" thus include the requirement that the cable operator provide billing and collection services.

In addition, Comcast claims that "the record does support the availability of alternative suppliers for such services." Comcast Pet. at 23, citing to Viacom Rep. Comments at 17-19. Viacom's representations alone, however, do not establish a record of competitive services. See also Order at n.1298. Similarly, Comcast's claim that "lessees interested in charging consumers a fee have many other options for doing so, as the

⁵ Comcast seems to suggest that the Commission should not require cable operators to provide billing and collection services because the Commission declined to set a maximum reasonable rate for such services. Comcast Pet. at 23. The Commission's failure to regulate one aspect of billing and collection does not preclude it from taking any action at all. However, given the lack of competition and the lack of market constraints on the cable operators, CME urges the Commission to reconsider its decision not to set maximum reasonable rates for billing and collection services.

Commission recognized seven years ago in deregulating the billing and collection services of the local telephone industry" is misguided. Comcast Pet. at 24. The Commission's treatment of telephone billing and collection services has no relevance in the cable television context. See CME Comments at 25-28.

Although we do not believe that the record supports a finding of competitive providers for billing and collection services, should the Commission conclude otherwise, it must clarify that the cable operators have to provide lessees with the information needed for billing at no extra charge. Only the cable operator knows which customers are taking the programming and has the information needed for billing and collection, e.g., the subscribers' names, addresses and credit information.

Since the cable operator already bills subscribers for other services, it clearly remains the entity that can most efficiently provide billing and collection services. Thus, to ensure the success of leased access, the Commission should reject the petitions urging it to reconsider its rule that cable operators must provide billing and collection services.

IV. The Commission Should Ensure that Prime Time Leasing Remains a Viable Part of Leased Access.

In its Order, the Commission concluded that the rate for part-time use of a leased access channel would be the pro-rated highest implicit access fee. Order, ¶ 518. Several of the petitions filed by the cable operators argue that the Commission should not permit part-time leasing because pro-rating the highest implicit access fee will result in a rate that will

"deprive operators of a reasonable return on leased access capacity." Cablevision Pet. at 13; see also Comcast Pet. at 22; Booth American Pet. at 48.⁶

CME urges the Commission to reject those Petitions that seek the elimination of all part-time leasing. It is essential to the success of leased access that programmers be permitted to lease less than a full channel. According to Matthew York, editor of Video Maker Magazine, a survey conducted by the magazine revealed that 25% of the magazine's 75,000 subscribers want to gain part-time access to a cable system. The diversity that Congress sought when it enacted the leased access provision will be

~~achieved only if such arrangements are permitted access to cable~~

that the cable operator should be granted discretion to deaverage lease rates to account for the value of prime time use.⁸

Continental Pet. at 23.

CME would not object to having the prices for part-time usage reflect the additional value of prime time. However, such variable pricing must be done within the construct of a reasonable pricing range and should ensure that non-prime time

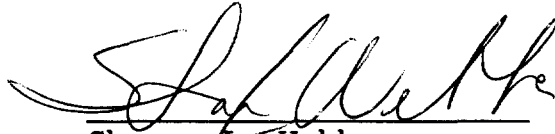
undermine Congress's intent to promote diversity and competition. The cable operators have submitted no hard evidence that such rates are needed to ensure their financial viability, and their claims of migration are unsubstantiated. The Commission thus should deny the petitions seeking higher rates and instead, lower the maximum reasonable rate as CME suggested in its earlier filing. See CME Reply Comments at 6.

The Commission should also clarify that home shopping networks will not be charged lower rates than other types of programmers. The adoption of such a policy could have the perverse effect of filling a cable system's leased access channels with home shopping. Such a result is clearly contrary to Congress's intent to increase diversity.

The Commission should deny petitions seeking reconsideration of its decision to require cable operators to provide billing and

For the foregoing reasons, CME respectfully requests that the Commission deny the Petitions for Reconsideration mentioned herein.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Sharon L. Webber', written over a horizontal line.

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July 21, 1993

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